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INCOME TAX — DEDUCTIONS — LEGAL FEES AS A MEDICAL EXPENSE*

In the recent case of *Gerstacker v. Commissioner*¹ the Court of Appeals for the Sixth Circuit reversed a decision of the Tax Court and allowed taxpayers to deduct the legal expenses which they had incurred in having Mrs. Gerstacker committed to a mental institution where doctors had advised that such commitment was necessary.

Taxpayers were husband and wife who in filing a joint tax return deducted the legal fees which they had incurred in securing the commitment of Mrs. Gerstacker to a mental institution through guardianship proceedings. All three of "(h)er doctors advised Mr. Gerstacker that his wife could be treated successfully *only* if she . . . could not leave and disrupt her therapy."² Taxpayers argued, therefore, that the legal fees were necessary medical expenses and deductible under Internal Revenue Code of 1954 (hereinafter Code) § 213(e)(1)(A and B)³, but the Tax Court⁴ decided that they were non-deductible personal expenses under Code section 262,⁵ saying that the legal services "were not rendered as a part of a course of 'treatment' for [Mrs. Gerstacker's] mental illness. They did not have a direct or proximate therapeutic effect on her mental disorders."⁶ In reversing for the taxpayers, the court of appeals held "that where legal expenses are necessary to legitimate a method of medical treatment for mental illness. . . ." they are deductible as a medical

* *Gerstacker v. Commissioner of Internal Revenue*, 414 F.2d 448 (6th Cir. 1969).

1. 414 F.2d 448 (6th Cir. 1969).

2. *Id.* at 449 (emphasis added).

3. INT. REV. CODE OF 1954, § 213 (e) (1) defined "medical care" as:
Amounts paid —

(A) for the diagnosis, cure mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,

(B) for transportation primarily for and essential to medical care referred to in subparagraph (A).

4. *Carl A. Gerstacker*, 49 T.C. 522 (1968).

5. INT. REV. CODE OF 1954, § 262 provides:
Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

6. 49 T.C. at 527.

7. 414 F.2d at 453.

expense. The court limited its decision by allowing taxpayers to deduct only those fees that were the direct cost of the guardianship proceedings.⁸

I. INTRODUCTION

Since the medical expense deduction is an exception to the general rule of section 262 that no deduction is allowed for personal expenses, it is subject to the broad rules governing all similar exceptions to that rule.⁹ The most familiar rule applicable to deductions is "that an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer."¹⁰

The purpose of this comment is to analyze the *Gerstacker* case and the tests that the court of appeals applied to overrule the Commissioner and the Tax Court. In *Gerstacker* the court of appeals discussed, first, the legislative history test, looking to the congressional intent behind the passage of the medical deduction section of the Code and, second, the Tax Court test for determining whether or not an expense is for "medical care." After consideration of these two standard tests, the court discussed two tests which have recently emerged and are being used to determine the proximate cause question of the medical necessity of the service creating the expense: the "direct—indirect" test and the "therapeutic value" test. By analysis of these tests within the context of the *Gerstacker* case, this comment will show the extent to which courts will now go to find the proximate cause necessary to provide taxpayer's relief within the limits of section 213.

II. LEGISLATIVE HISTORY

The court of appeals in *Gerstacker*, like most courts which have dealt with section 213(1)(e) of the Code,¹¹ looked to the legislative history of the statute to determine how inclusively that section should be interpreted. The leading case on the weight to be given the legislative history of section 213 (1) (e)

8. *Id.*

9. See Treas. Reg. § 1.262-1 (c) (1967).

10. *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 (1943), rehearing denied 320 U.S. 809. See also *Oliver v. Commissioner*, 364 F.2d 575 (8th Cir. 1966); Treas. Reg. § 1.213-1(h) (1969); and Note, *An Argument Against the Doctrine that Deductions Should be Narrowly Construed As a Matter of Legislative Grace*, 56 HARV. L. REV. 1142 (1943).

11. See generally *Commissioner v. Bilder*, 369 U.S. 499 (1962); *Carasso v. Commissioner*, 292 F.2d 367 (2d Cir. 1961); *Ochs v. Commissioner*, 195 F.2d 692 (2d Cir. 1952); *Commissioner v. Stringham*, 183 F.2d 579 (6th Cir. 1950).

is *Commissioner v. Bilder*.¹² In that case the Supreme Court rejected a lengthy argument by the taxpayer asking the Court to confine its interpretation of the statute to the express language on the face of the statute. Taxpayer had persuaded the court of appeals to allow him to deduct the cost of his meals and lodging incurred while resting in Florida on doctor's advice. In doing so, the taxpayer had persuaded the court of appeals to reject the Commissioner's argument which was based on House and Senate reports where, in the hypothetical situation there discussed, a deduction was not allowed. The facts of the hypothetical were precisely similar to those in *Bilder*. The *Bilder* Court, in reversing the court of appeals, said simply that it was relying "on the congressional purpose explicitly revealed in the House and Senate Committee Reports"¹³

By looking at congressional reports proposing the allowance of a deduction for "extraordinary" medical expenses in 1942 and those accompanying the 1954 revisions,¹⁴ we see the basis which most courts have used for determining the inclusiveness of the statute. In the Finance Committee's report in 1942 the reason for the enactment of a medical deduction section was given: "This allowance is recommended in consideration of the heavy tax burden that must be borne by individuals during the existing emergency and of the desirability of maintaining the present high level of public health and morale."¹⁵ That report continued by saying:

The term "medical care" is *broadly* defined to include amounts paid for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body. It is not intended, however, that a deduction should be allowed for any expense that is not incurred *primarily* for

12. 369 U.S. 499 (1962).

13. *Id.* at 502.

14. In the 1939 Code a deduction for medical expenses was allowed by section 24 (a) (1) [replaced by section 262 of 1954 Code] which provided that "in computing net income no deduction shall in any case be allowed in respect of—(1) personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x)" [*Commissioner v. Bilder*, 289 F.2d 291, 307 (3rd Cir. 1961).] "Section 23 (x) of the 1939 Code was added to that Code by section 127 (a) of the Revenue Act of 1942." [*Id.* at 298.] In the 1954 Code language nearly identical to that of section 23 (x) was enacted as section 213(e) (1). [*Commissioner v. Bilder*, 369 U.S. 499, 501 (1962).]

15. S. REP. NO. 1631, 77th Cong., 2d Sess. 6 (1942).

the prevention or alleviation of a physical or mental defect or illness.¹⁶

The re-enactment of section 23 (x) of the 1939 Code as section 213 of the 1954 Code contained several liberalizing sections¹⁷ which were described in the House Committee Reports as necessary for the purpose of allowing "the deduction of 'extraordinary' medical expenses."¹⁸ Of the many amendments since 1954,¹⁹ the 1966 Amendment removing the maximum ceiling on the amount of deductions allowed was probably the most liberalizing step taken by Congress. This latest amendment's liberalizing effect was recognized by the House Conferees when they reported "that the removal of the ceiling on medical deductions, while generally desirable, may raise problems in connection with amounts claimed as medical expenses deductions"²⁰ Following this trend toward liberalization and broad interpretation of what constitutes "extraordinary" medical expenses, the court in *Gerstacker* stated "that Congress intended to define 'medical care' broadly and that the legislation was remedial in nature."²¹

III. HAVEY AND BILDER TESTS

The two main cases consistently relied on to determine whether or not an expense is deductible under section 213(e)(1) are *Edward A. Havey*²² and *Commissioner v. Bilder*.²³ The *Havey* case established the basic test for determining what constitutes a deductible medical expense:

To be deductible as medical expense, there must be a direct or proximate relation between the expense and the diagnosis, cure, mitigation, treatment, or prevention of disease or the expense must have been incurred for

16. *Id.* at 95-96 (emphasis added); accord, Treas. Reg. § 1-213-1 (e) (1) (ii).

17. The Committee report states that the amending provision: allows medical expenses in excess of 3 percent of the adjusted gross income to be deducted, instead of only those in excess of 5 percent; outlays for drugs and medicine may be included in 'medical expenses only to the extent they exceed 1 percent of adjusted gross income; and the maximum limitations are raised from \$1,250 to \$2,500 per exemption, and the overall limit per return is raised from \$2,500 to \$5,000, or in the case of a joint return from \$5,000 to \$10,000. H. R. REP. NO. 1337, 83d Cong., 2d Sess. A 60 (1964); 1954 U.S. CODE CONG. AND ADM. NEWS, 4055.

18. *Id.*

19. CONF. REP. NO. 682, 111 CONG. REC. 17527, 17540 (1965).

20. *Id.*

21. 414 F.2d at 450.

22. 12 T.C. 409 (1949).

23. 369 U.S. 499 (1962).

the purpose of affecting some structure or function of the body.

In determining allowability, many factors must be considered. Consideration should be accorded the *motive* or purpose of the taxpayer, but such factor is not alone determinative. To accord it conclusive weight would make nugatory the prohibition against allowing personal, living, or family expenses. Thus also it is important to inquire as to the *origin* of the expense. Was it incurred at the direction or suggestion of a physician; did the treatment bear directly on the physical condition in question; did the treatment bear such a direct or proximate therapeutic relation to the bodily condition as to justify a reasonable belief the same would be efficacious; was the treatment so proximate in time to the onset or recurrence of the disease or condition as to make one the true occasion of the other, thus eliminating expense incurred for general, as contrasted with some specific, physical improvement?²⁴

Bilder is the only time that the United States Supreme Court has granted certiorari to a medical deduction tax case. As stated, in this decision the Court reversed a court of appeals decision and adhered strictly to the legislative history of section 213(1)(e) to determine the congressional intent behind the statute. It decided that this intent should be controlling when interpreting the statute. The Commissioner in *Gerstacker* cited *Bilder* as a limitation on what could be deductible as a medical expense since the *Bilder* court refused to allow the taxpayer to deduct his meals and rent while in Florida for treatment. But the court of appeals in *Gerstacker* read *Bilder* as not being so restrictive as to disallow legal fees as a medical deduction.²⁵ It appears that the *Gerstacker* court refused to read *Bilder* as limiting the inclusiveness of a medical expense. This leads to the conclusion that *Bilder* should be narrowly construed and that courts interpreting medical deduction sections should be controlled by congressional intent when specifically set out in the legislative history.²⁶

24. 12 T.C. 409, 412 (1949), *quoted in* *Gerstacker v. Commissioner*, 414 F.2d 448, 450 (6th Cir. 1969) (emphasis added).

25. 414 F.2d at 452.

26. *Cf. United States v. Ohio*, 354 F.2d 549, 555 (6th Cir. 1966); *Newman & Co. v. United States*, 290 F. Supp. 170, 175 (S.D.N.Y. 1968); *Norris Dispensers, Inc. v. United States*, 211 F. Supp. 79, 80 (D. Minn. 1962).

IV. "DIRECT-INDIRECT" AND "THERAPEUTIC VALUE" TESTS

After discussing the *Havey* test and the *Bilder* legislative history argument, the *Gerstacker* court seems to have decided the issue on how "directly" the expense must relate to the illness and the "therapeutic value" of the services creating the expense. Statements by the court lead to the conclusion that the courts may be taking a liberal turn toward allowing medical deductions. The court refused the Commissioner's argument of a strict "direct-indirect" test and said the expenditure "must be proximately related to taxpayer's medical care"²⁷ to be deductible. The court also found that "the services of the *personal attorney* for Mrs. Gerstacker . . . had a directly therapeutic value."²⁸ And finally, the court took a further liberal step by saying "except for Mrs. Gerstacker's illness these expenses would not have been incurred."²⁹

Looking at the medical deduction field generally, there seem to be two major groupings in which one could categorize the court's and the Commissioner's decisions dealing with an interpretation of section 213(e)(1) of the Code. They are, first, the expenses incurred in treating mental illness and, second, those incurred in treating physical illness. These groups can be subdivided into several divisions.³⁰ The physical illness category contains expenditures for capital improvements [*i.e.*, air conditioners, dust elimination systems, elevators, fall-out shelters, furnaces, iron lung facilities, oxygen equipment, reclining chairs, and swimming pools]; special foods and diets; and travel and transportation [*i.e.*, trips to Florida or Bermuda, special automobiles, and trips to the golf course]. The mental illness category contains expenditures for special schools and care [*i.e.*, remedial reading class, mental institutions, private schools, nurseries, military schools, and schools for the blind and the deaf] and therapeutic activities [*i.e.*, clarinet and dancing lessons, use of contraceptives, wigs, and legal aid]. To get a better understanding of why the court in *Gerstacker* took a liberal stand and to predict the possible effects of this decision, some conclusions, derived mostly from the cases and rulings in the mental illness category, will be expressed.

27. 414 F.2d 448, 450 (6th Cir. 1969).

28. *Id.* at 451 (emphasis added).

29. *Id.* at 450.

30. Shames, *The Unusual Medical Expense: How Taxpayers Succeeded in Proving Their Case*, 24 J. TAXATION 48 (1966). Shames' divisions have been utilized, but his examples have been supplemented and updated.

The "direct-indirect" test was a euphemism for the language from the 1942 Senate Report saying that the statute was to apply only to expense incurred "*primarily* for the prevention or alleviation of a physical or mental defect or illness."³¹

This language has also been incorporated into the Treasury Regulations by the Commissioner.³² Although this has been the most consistently applied test for determining whether or not an expense is deductible as medical care, the Tax Court in *Gerstacker* relied explicitly on *Bilder* and *H. Grant Atkinson*³³ for its interpretation.³⁴

As discussed above, *Bilder* was reversed by the Supreme Court because of specific legislative history covering the fact question; the Commissioner in *Gerstacker*, however, attempted to impute a strict interpretation to the language of section 213(e)(1)(A).³⁵ By rejecting this argument, the court seems to have recognized that the word, "primarily," as used to limit "medical care" in the legislative history, is broader than the "primarily" used to limit the deductibility of transportation expenses.

Besides refusing the interpretation of the "direct-indirect" test of *Bilder*, *Gerstacker* also refused to be limited by *Atkinson*. There the Tax Court refused to allow taxpayer to deduct the tuition of a mentally ill child sent to a military school on a doctor's recommendation. The court found that, since the school did not have a medical staff, the "availability of medical care" or of special resources for a handicapped individual was not 'a principal reason' for [taxpayer's son's] attendance . . ."³⁶ At the end of its opinion the Tax Court fortified the Commissioner's "direct-indirect" test by saying: "The Congress did not see fit to provide as a condition for a medical expense deduction the mere prescription by a doctor of some course of procedure regardless of the condition of the individual, the nature of the expense, and the primary and direct objectives thereof."³⁷ Although this was a strong holding for the Commissioner, its effect should have been mitigated by a post-trial article appeal-

31. S. REP. NO. 1631, 77th Cong., 2d Sess. 95-96.

32. Treas. Reg. § 1.213-1 (e) (1) (ii).

33. 44 T.C. 39 (1965), *acquiesced in* 1965-2 CUM. BULL. 4.

34. 49 T.C. at 525.

35. 414 F.2d at 452.

36. 44 T.C. at 53.

37. *Id.* at 54.

ing for compassion for the mentally handicapped by the attorney for the Internal Revenue Service in *Atkinson*.³⁸

The landmark decision for the special school cases and the "direct-indirect" test was *Commissioner v. Stringham*³⁹ where the court allowed taxpayer a deduction for his child's lodging and meals in Arizona as necessary to alleviate her respiratory disease but refused to allow a deduction for the cost of her schooling since the school provided no medical treatment per se. The only other school case to reach the appellate courts was *Ochs v. Commissioner*⁴⁰ where the court upheld the decision of the Tax Court and disallowed the expense of sending children to boarding school to separate them from their mother. Such separation was recommended by a doctor because, as a result of a cancer operation, the mother suffered from extreme pain when she had to speak to correct the children. The *Gerstacker* court distinguished this case as holding that, if there were an alternative action which would directly alleviate taxpayer's illness [such as the mother's leaving], it should be taken and would be deductible. The only help available to Mrs. Gerstacker was, however, commitment to a mental institution.⁴¹

Although there have been only two appellate court cases dealing with special schools, the Tax Court for many years set the requirements which must be completed before a medical deduction would be allowed: (1) the attendance must be on doctor's recommendation; (2) the school must offer some special medical sources or resources which can alleviate a special problem; and (3) the attendance must be primarily for medical care.⁴² But, in *G. Fink Fischer*,⁴³ acquiesced in by the Commissioner in 1969,⁴⁴ the Tax Court may have opened the door for the deduction of legal fees in such cases.

38. Muchin, *Private Schooling for Emotionally Disturbed Children: Is It a Medical Expense?*, 44 TAXES 699 (1966).

39. 183 F.2d 579 (6th Cir. 1950).

40. 195 F.2d 692 (2d Cir. 1952), cert. denied, 344 U.S. 827 (1952).

41. 414 F.2d at 452.

42. See, e.g., H. G. Atkinson, Jr., 44 T.C. 39 (1965), acquiesced in 1965-2 CUM. BULL. 4; W.B. Counts, 42 T.C. 755 (1964), acquiesced in 1964-2 CUM. BULL. 4; M. Feinberg, 25 CCH Tax Ct. Mem. 777 (1966); Hobart J. Hendrick, 35 T.C. 1223 (1961), acquiesced in 1962-2 CUM. BULL. 4; M. J. Lichterman, 37 T.C. 586 (1961), acquiesced in 1962-2 CUM. BULL. 5; and I. J. Weinberg, 28 CCH Tax Ct. Mem. 10 (1969).

43. 50 T.C. 164 (1968), acquiesced in 1969-24 CUM. BULL. 7.

44. Acquiescence occurred subsequent to all decisions cited in n.42. This acceptance by the Commissioner may indicate that he will follow it in subsequent litigation.

In granting taxpayer a partial deduction for sending a problem child to a special school which deals specifically with "slow" children, the court said:

Whether a service for which an expenditure is made constitutes medical care will depend upon its therapeutic nature to the individual, and not upon the title of the person rendering the service, or whether the expense is 'medical' to all persons, or the general nature of the institution in which the service is rendered.⁴⁵

This appears to be a subjective test and would therefore allow the individual taxpayer a better opportunity to convince a jury in the Court of Claims or a district court of his special problems and needs.

The *Fink* case led a tax critic to note that "to date no taxpayer has first paid the amount in issue and then contested the IRS' rejection of a refund claim by filing a refund suit in either the district court, where a jury trial can be obtained, or in the Court of Claims. Conceivably, these courts might take a more liberal approach . . ." to the individual taxpayer's problems.⁴⁶

The court's finding in *Gerstacker* that "the services of the personal attorney for Mrs. Gerstacker, because of some of the peculiarities of her emotional disturbance and her confidence in him as a personal friend, had a distinctly therapeutic value"⁴⁷ requires us to look at what is the test of "therapeutic value". This test is mentioned in the *Havey*⁴⁸ case and in the Treasury Regulations.⁴⁹

In determining whether or not true "therapeutic value" exists, the decisions have been most insistent on specific recommendation from a physician with less emphasis on the primary relation between the defect and the prescribed cure. In the only appellate

45. *Id.* at 174.

46. Block, *Is Climate Improving for Medical Deductions for Special School Tuition*, 32 J. TAXATION 116, 118 (Feb. 1970).

47. 414 F.2d at 451.

48. The Tax Court in stating the basic tests asked: "[D]id the treatment bear such a direct or proximate therapeutic relation to the bodily conditions as to justify a reasonable belief the same would be efficacious. . . ?" 12 T.C. at 412.

49. Treas. Reg. § 1-213 (1) (e) (1) (ii) provides in part:

Amounts paid for . . . treatments affecting any portion of the body, including . . . expenses of therapy . . . are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care.

court case to date, *Adler v. Commissioner*,⁵⁰ the court disallowed deductions for dancing lessons as a cure for varicose veins since they were not prescribed by a doctor. The *Adler* court relied on *John J. Thoenes*⁵¹ where the Tax Court similarly would not allow doctor-recommended dancing lessons. The *Thoenes* court recognized that "[t]he fact that dancing was included in the list of activities . . . , which the psychiatrist felt would be beneficial, does not mean the dance lessons can be characterized as medical care."⁵² But, the Commissioner went so far in a 1962 ruling as to allow a taxpayer to deduct the cost of "the doctor prescribed wig in the belief that it would be essential to her mental health"⁵³ since taxpayer had lost all her hair as a result of a disease. In another ruling a taxpayer was allowed to deduct the cost of a clarinet and lessons on the recommendations of an orthodontist that it could alleviate a disease of the teeth.⁵⁴ It would appear from these decisions that "therapeutic value" is not a conclusion for the Commissioner or a judge, but it is their determination of the strength and specificity of the doctor's recommendations presented by the taxpayer as the motivating force in his action to incur the medical expense. From this we can conclude that although the facts in *Gerstacker* and Revenue Ruling 68-320⁵⁵ are similar—taxpayer sought to deduct the legal costs of having his son committed to a state institution for treatment—the Ruling will probably stand against the taxpayer on the theory that there was no evidence in the Ruling that the taxpayer's action was taken on a doctor's advice.

V. CONCLUSION

From the decisions and conclusions presented, it can be deduced that, in approaching problems dealing with expenses incurred in alleviating or mitigating a mental illness which is almost always vague as to noticeability and extent, "the practitioner's biggest problem is to get a court to understand that an emotional or mental 'disease' is as serious as a respiratory disease. . . ."⁵⁶ This comment has also attempted to show that the requirements of proximate cause—at least in the mental illness area—have become more liberal in the taxpayer's favor. Some

50. 330 F.2d 91 (9th Cir. 1964).

51. 33 T.C. 62 (1959).

52. *Id.* at 65.

53. Rev. Rul. 62-189, 1962-2 CUM. BULL. 88.

54. Rev. Rul. 62-210, 1962-2 CUM. BULL. 89.

55. Rev. Rul. 68-320, 1968-1 CUM. BULL. 93.

56. *Supra* note 38 at 701.

more suggestions to the tax lawyer in approaching difficult problems include "[p]roper testimony couched in the medical terminology of the Code. . . . [and] enlightened and detailed testimony from physicians. . . ." ⁵⁷ The tax lawyer might also well argue that "medical deductions stand apart from entertainment, travel, and other business expenses, and a more liberal attitude favoring their deductibility might be warranted." ⁵⁸

In conclusion, the Court of Appeals in *Ochs* made the most appropriate statement concerning how problems dealing with the medical deduction section of the Code should be presented when it said: "Line drawing may be difficult here as elsewhere, but that is what courts are for. . . ." ⁵⁹ That court went on to say that "courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, there is a horse's tail at some time." ⁶⁰

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57. *Id.* at 703.

58. *Id.*

59. 195 F.2d at 698.

60. *Id.*, citing *Lavery v. Purssell*, 39 Ch. D. 508, 517 (1888).